

(1999) 01 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 3229 of 1998

Mane Kunal Naresh

APPELLANT

Vs

Pawar Vithal Jyoti and others

RESPONDENT

Date of Decision : 13-01-1999

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 28
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1999 Bom 124 : (1999) 1 ALLMR 491 : (1999) 2 BomCR 135 :
(1999) 2 MhLj 102

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : P.M. Havnur, for the Appellant; M.P. Vashi and Mrs. U.H. Deshpande,
for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—The petitioner challenges in this writ petition the order passed by the Small Cause Court at Bombay in Municipal Election Petition No. 63/97 on 5th May, 1998 wherein the petitioner's candidature as Municipal Councillor in Brihan Mumbai Municipal Corporation has been set aside. The election of the Brihan Mumbai Municipal Corporation was held on 23-2-1997. The petitioner among other candidates had contested the election in Ward No. 68 and got elected, by securing 5728 votes. The next defeated candidate, the respondent No. 1 herein, secured 3682 votes. The main ground of the challenge of the petitioner's election made by the first respondent before the Court below was that his age was below 21 years at the time of filing his nomination as against the prescribed minimum age to contest the election was 21 years and above. The Small Cause Court on going through the evidence produced by the parties both oral and documentary, found that at the time of filing the nomination for the election, the petitioner was under aged and therefore his election was set aside and the respondent No. 1 declared elected as Municipal Councillor of Ward No. 68, in his place.

2. Shri P.M. Havnur the learned Counsel for the petitioner inter alia contended

that the finding by the Court below regarding the age of the petitioner was erroneous. He also submits that the date of birth of the petitioner shown in the birth extract maintained in the Municipal Corporation has been discarded by the lower Court and the lower Court has relied upon the School Register where the petitioner was studying, to decide the age of the petitioner. The learned Counsel for the petitioner submits that according to the birth extract, his date of birth was 1-9-1972 whereas according to the School-Register, which was produced at the instance of the respondent No. 1, petitioner's date of birth was shown as 5-5-1973. As per yet another certificate, which was produced at the instance of first respondent was shown that his date of birth was 5-10-1979. The Court below has rightly rejected the school certificate. The Court below also rejected the birth extract, on the ground that certain fabrication is made in the birth extract. I have perused the birth extract and I have seen that the petitioner's name was entered in the register only just one day before the filing of the nomination. The lower Court has found that it is not safe to rely upon that birth extracts because of the last minute correction, particularly when it has come out in evidence that there are marked discrepancies in the name of mother of the petitioner. The petitioner did not choose to examine his father who is competent to clear the shadow of doubts regarding his age. However, I am not going into the sufficiency of the ground stated by the lower Court for rejecting the birth extract produced by the petitioner. I need only to say that in exercising the jurisdiction under Article 227 of the Constitution, this Court is not supposed to go into the sufficiency or the efficacy of the reasons stated by the Court below in rejecting birth extract, though it may be more reliable document as against the other evidence to prove one's age. In short, the first respondent has succeeded to prove that the petitioner was suffering from disqualification to file the nomination on the date of filing of the nomination. In view of this, I find no reason on merit to interfere with the finding of the Court below as it suffers from no illegality or infirmity.

3. The learned Counsel for the petitioner has next contended that the preliminary objection raised by the petitioner before the Court below that all the candidates contested in the election, are essential party to the proceedings was illegally rejected by the Court below and therefore the petition ought to have been dismissed on that ground alone. He brought to my attention to fortify his argument, to section 33(1) of the Bombay Municipal Corporation Act, 1888, (hereinafter called the Act), He contended that based on this, any petition to challenge the election of the successful candidate would be maintainable only when all the unsuccessful candidates contested the election made party. I have gone through this section carefully and I do not find any such mandate is provided in that section. To appreciate the argument of the learned Counsel for the petitioner, it is necessary here to extract section 33.

33(1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection (by the State Election Commissioner) of a

nomination or of the improper reception or refusal of a vote, or for any other cause or if the validity of the election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of section 28-F, any person enrolled in the Municipal election roll may, at any time, within fifteen days from the date on which the list prescribed under Clause (k) of section 28 was available for sale or inspection, apply to the Chief Judge of the Small Cause Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who although not declared elected, have, according to the results declared by the State Election Commissioner u/s 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.

(1A) The applicant shall whenever so required by the Chief Judge, deposit in the Court a sum of Rs. 500/- in cash or Government securities of equivalent value at the market rate of the day as security for any costs which the applicant may be ordered to pay to other parties to the said application.

(2) If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to it not disqualified he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person and against whose election no cause of objection is found, shall be deemed to have been elected.

The aforesaid provisions clearly specify that the applicant shall make party all the candidates who had obtained a greater number of votes. Mr. M.P. Vashi the learned Counsel for the first respondent submits that in view of this section only those candidates who got greater vote than the petitioner alone would be required to be made party in the election petition. In other words if a candidate challenges the election of a successful candidate, he must make parties all the candidates who got greater votes than him. Here the first respondent has made party only the petitioner because he alone got the greater vote in the election than them. In other words he need not make party to the petition the other candidates as parties, who obtained lessor vote than the petitioner before the trial Court.

4. The said sub-section (3) of section 33 says that in case the election of a successful candidate declared null and void, then the candidate who got the next higher number of valid votes to be declared as successful candidate. In the wording of section, it is clear that if the successful candidate is declared to be null and void, then the Court should declare the next candidate who got the next higher vote as a successful candidate. The lower Court has correctly and rightly declared the first respondent as a successful candidate, to be the Municipal

Councillor by virtue of subsection (2) of section 33.

5. Therefore, I find no grounds to interfere with this case. Before parting with the decision, I have to refer to certain decisions relied upon by the petitioner in this case. In order to fortify his argument he cited a decision reported in (In re: The Specific Relief Act), 1910 (XII) The Bombay Law Reporter, page 737, wherein this Court has decided the operation of sub-section (2) of section 33. In that case without declaring the election to be null and void, declared the next candidate who got higher votes. A question was posed whether this Court can go into the question before declaring the next candidate who got next higher votes, whether votes secured by him are valid votes or not. Relying upon this the learned Counsel submits that without going into the validity of the votes secured by the first respondent, it is illegal on the part of the Small Cause Court to declare the first respondent as a successful candidate. I am afraid whether this question could be examined in this case at this stage, because the validity of votes obtained by the other candidates in the election was never in dispute and the cited decision is totally different with the facts of this case.

6. The learned Counsel for the petitioner further brought to my notice another decision of Pyare Saheb Gulzar Chhotumiya Sawazi v. Dashrath Wasudep Daff and others, reported in 1977 Mh.L. J. 246. Relying upon the observations made therein learned Counsel for the petitioner submits that declaration in favour of the candidate securing next highest number of votes does not automatically follow. The contention of the learned Counsel cannot be accepted unless he show that section 33 of the Bombay Municipal Corporation Act, 1888 in the para materia with the "City of Nagpur Corporation Act 1950". I find that the language is different. Therefore this decision is of no help to the case of the petitioner.

7. Another decision which was cited by the learned Counsel for the petitioner is Dnyaneshwar Rambhau Barabudhe Vs. Returning Officer/Dy. Collector (EGS), Amravati and others, wherein it is held is that if there are more than two candidates in the election fray and in case one of them has been disqualified the candidate obtaining the next highest number of votes cannot be automatically declared to be elected. This again under the provisions of Bombay Provincial Municipal Corporations Act, 1949 and the learned Counsel has not shown to me that the provisions of the said Act and the present case is parameter in the language used in the section. Therefore that decision also cannot be of no use in deciding this case.

8. Of course the learned Counsel has demonstrated to me the situation where by the operation of sub-section (2) of section 33 a candidate who secured a very very negligible number of votes, sometimes had to be declared elected by virtue of operation of section 33(2) of the Act. Definitely it is a matter of concern of the Legislature and not of Court. Such situation cannot however be remedied by the Court of law.

9. In view of this, the writ petition is dismissed. Rule is discharged. No order as

to costs.

10. However, at the request of the learned Counsel for the petitioner, interim stay will continue for another two weeks.

11. Petition dismissed.